

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BOBBY JOE BUTTERS,

Defendant-Appellant.

UNPUBLISHED

July 22, 2003

No. 239277

Midland Circuit Court

LC No. 01-009873-FH

Before: Zahra, P.J., and Talbot and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of third-degree fleeing and eluding a police officer, MCL 750.479a(3), and felonious assault, MCL 750.82, entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was the subject of a police investigation. On June 2, 2001 the police observed his truck parked at a tavern. A police officer testified that he saw a male fitting defendant's description leave the tavern in defendant's truck. The truck left the tavern, and the police gave chase. The chase went on for eight miles and reached speeds of 100 miles an hour. At one point the truck traveled toward the police cars at a high rate of speed and struck a police car.

Defendant was originally charged with third-degree fleeing and eluding a police officer, two counts of felonious assault, malicious destruction of fire or police property, MCL 750.377b, operating a vehicle with license suspended or revoked, MCL 257.904(3)(b), and driving a vehicle with suspended or missing license plate, MCL 257.255(1). As noted above, the jury convicted defendant of third-degree fleeing and eluding and one count of felonious assault, acquitted him of malicious destruction of fire or police property, and was unable to reach a verdict on the remaining count of felonious assault. Subsequently, the trial court dismissed the remaining charge of felonious assault and the operating offenses.

Defendant contends that prosecutorial misconduct occurred where several of the prosecution's questions led to testimony that was unduly prejudicial. Generally, we review claims of prosecutorial misconduct "case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial." *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). Where, as here, "a defendant fails to object to an alleged prosecutorial impropriety, the issue is reviewed for plain error." *Id.* "[T]o avoid forfeiture of the

issue, defendant must demonstrate plain error that affected his substantial rights, i.e., that affected the outcome of the proceedings.” *Id.*

First, defendant contends that prosecutorial misconduct occurred when the prosecutor, while questioning one of the police officers that purportedly chased defendant, referred to the person that the police officer was chasing as “the defendant.” Defendant correctly notes that the prosecutor did not elicit testimony establishing that the person that the police officer was chasing was, in fact, defendant. However, the police officer testified that the person matched defendant’s description, and the testimony suggested that the police officer was chasing defendant’s truck. Moreover, in denying defendant’s motion for a new trial, the trial court correctly noted that subsequent evidence supported an inference that defendant was driving the truck. Accordingly, we do not believe that the mistaken reference had any impact on the outcome of the proceedings. *Aldrich, supra* at 110. Consequently, we reject defendant’s contention of error.

Second, defendant contends that prosecutorial misconduct occurred when the prosecutor elicited testimony from one of the police officers establishing that the police officer had “dealt with” defendant on two prior occasions. However, we note that the testimony did not specify the purpose of the prior contacts. Although one possible inference would be that defendant had run afoul of the law, it is also possible that defendant was a witness or somehow assisted the police officers in locating or arresting someone else. Further, because one of the primary issues was the identity of the person driving defendant’s truck from the tavern, the probative value of the evidence exceeded the potential for unfair prejudice. In addition, the trial court further minimized the potential for unfair prejudice by properly instructing the jury that the previous contacts with defendant could not be considered as evidence that defendant committed the instant offenses. Jurors are, of course, presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Consequently, we reject defendant’s contention of error.

Third, defendant contends that prosecutorial misconduct occurred where the prosecutor elicited testimony from defendant’s girlfriend’s boss that defendant’s girlfriend brought individuals with poor character into the tavern. Defendant notes that the boss’s comments were not responsive, but contends that the prosecutor should have cautioned the witness to avoid gratuitous comments. However, defendant cites no authority in support of his contention that this line of questioning constituted prosecutorial misconduct. Regardless, a layperson’s unresponsive, volunteered answer to a proper question is ordinarily not an error requiring reversal. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). Accordingly, defendant’s final contention of prosecutorial misconduct is without merit.

Defendant also contends that he was deprived of his constitutional right to effective assistance of counsel because trial counsel failed to object to any of the aforementioned instances of prosecutorial misconduct. A successful claim of ineffective assistance of counsel requires a defendant to “show that counsel’s performance was deficient and that there is a reasonable probability that, but for the deficiency, the factfinder would not have convicted the defendant.” *People v Snider*, 239 Mich App 393, 423-424; 608 NW2d 502 (2000). However, trial counsel is not ineffective for failing to advocate a meritless position. *Id.* at 425. Having concluded that there is no merit to defendant’s contentions of prosecutorial misconduct, we reject his assertion that counsel was ineffective.

Defendant also contends that trial counsel was ineffective for failing to call Doreen Inman, his grandmother, as an alibi witness. It is well established that a trial counsel's "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Garza*, 246 Mich App 251, 255; 631 N.W.2d 764 (2001). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Id.* We note that Inman's affidavit did not indicate that she could have offered any relevant testimony regarding the primary issue in the case: whether defendant drove his truck away from the tavern on the night of the incident. Accordingly, even if we were to analyze trial counsel's competence with the benefit of hindsight, it does not appear that the failure to call Inman as a witness was deficient or impacted the outcome of the proceedings. *Snider, supra* at 423-424.

Defendant also contends that trial counsel was ineffective for failing to request an alibi instruction, CJI2d 7.4. However, as noted by the trial court, the instant matter involved a question of identity, rather than a traditional alibi defense. Accordingly, we are not persuaded that trial counsel was deficient for failing to request the jury instruction. *Snider, supra* at 423-424. For the same reason, we reject defendant's assertion that the trial court erred in failing to sua sponte provide that instruction. Instead, we conclude that the jury instructions "fairly presented the issues to be tried" and sufficiently protected defendant's rights. See *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994).

Finally, defendant contends that the trial court erred in denying his motion for a new trial. We review a trial court's decision denying a motion for a new trial for an abuse of discretion. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). Because there is no merit to any of defendant's contentions of error, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Donald S. Owens